

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DAVID LEE PHILLIPS,

Plaintiff(s),

v.

STATE BAR OF NEVADA, et al.,

Defendant(s).

Case No. 2:14-CV-2031 JCM (VCF)

ORDER

Presently before the court is defendants The State Bar of Nevada (the “State Bar”) and Phillip J. Pattee’s motion to dismiss the second amended complaint. (Doc. # 10). *Pro se* plaintiff David Lee Phillips filed a response in opposition (doc. # 11), and defendants filed a reply. (Doc. # 14).

I. Background

Plaintiff brings claims against the State Bar and two attorneys who were employed by the State Bar at the time of the allegations underlying the complaint. (Doc. # 7 at 2–3). According to the second amended complaint (“SAC”), there was a civil complaint pending against Mr. Phillips at the time the original complaint in this matter was filed. (*Id.* at 3). Plaintiff alleges that defendant Glenn Machado¹ provided a reporter covering the civil litigation against plaintiff with the information that “there were [seven] other [b]ar [g]rievances pending [against Mr. Phillips]. (*Id.*)

Phillips alleges that such a disclosure, whether made in Mr. Machado’s official or individual capacity, violates the Nevada Supreme Court Rules (“NSCR”) that govern proceedings related to attorney misconduct, specifically NSCR 121(1). NSCR 121 contains the standards for

¹ The record indicates that defendant Glenn Machado has not been served with a copy of the second amended complaint or a summons in this matter. (*See* doc. # 9 at 3). Because the complaint will be dismissed on other grounds, however, the court will not address the deficiency of service.

1 confidentiality of such proceedings. (*Id.*) Plaintiff argues that the violation of NSCR 121(1) is a
 2 violation of the Nevada and United States Constitutions. (*Id.* at 4).

3 Plaintiff brings claims for violations of his due process and equal protection rights under
 4 42 U.S.C. § 1983 (“section 1983”) against the State Bar and individual defendants. He also asserts
 5 an independent due process violation under the Fourteenth Amendment to the U.S. Constitution.
 6 Finally, he brings state law claims for libel, slander per se, intentional and negligent infliction of
 7 emotional distress, breach of contract, breach of the implied covenant of good faith and fair
 8 dealing, and tortious interference with an existing contractual relationship. Mr. Phillips seeks
 9 monetary, declaratory, and injunctive relief.

10 **II. Legal Standard**

11 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
 12 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and
 13 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2);
 14 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
 15 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
 16 elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted).
 17 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at
 18 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to
 19 “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

20 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 21 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 22 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
 23 *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory
 24 statements, do not suffice. *Id.* at 1949. Second, the court must consider whether the factual
 25 allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is facially
 26 plausible when the plaintiff’s complaint alleges facts that allow the court to draw a reasonable
 27 inference that the defendant is liable for the alleged misconduct. *Id.* at 1949.

28 Where the complaint does not “permit the court to infer more than the mere possibility of
 misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief.”
Id. (internal quotations and alterations omitted). When the allegations in a complaint have not

1 crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550
 2 U.S. at 570.

3 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 4 1216 (9th Cir. 2011). The *Starr* court stated, “First, to be entitled to the presumption of truth,
 5 allegations in a complaint or counterclaim may not simply recite the elements of a cause of action,
 6 but must contain sufficient allegations of underlying facts to give fair notice and to enable the
 7 opposing party to defend itself effectively. Second, the factual allegations that are taken as true
 8 must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing
 9 party to be subjected to the expense of discovery and continued litigation.” *Id.*

10 **III. Discussion**

11 As an initial matter, the court acknowledges that plaintiff's complaint was filed *pro*
 12 *se*² and is therefore held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)
 13 (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully
 14 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”)
 15 (internal quotations and citations omitted). However, “*pro se* litigants in an ordinary civil case
 16 should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*, 790
 17 F.2d 1362, 1364 (9th Cir. 1986).

18 Mr. Phillips brings federal claims for: (a) violation of his Fourth and Fourteenth
 19 Amendment due process rights under section 1983; (b) violation of his Fourth and Fourteenth
 20 Amendment equal protection rights under section 1983; and (c) an independent violation of the
 21 Fourteenth Amendment. These claims will be addressed in turn. He also brings state law claims
 22 for relief, as described above. Those claims will be addressed after the federal claims.

23 *A. Plaintiff's allegations do not implicate the Fourth Amendment*

24 In both his due process and equal protection claims, Mr. Phillips asserts violation of the
 25 Fourth Amendment. (*See* doc. # 7 at 4–6). The Fourth Amendment protects individuals against
 26 unreasonable searches and seizures. *See* U.S. Const. amend. IV. Plaintiff has not alleged that a
 27 search or seizure, within the meaning of the Fourth Amendment, occurred. (*See* doc. # 7).

28 In his opposition brief, Mr. Phillips argues that by disseminating his allegedly confidential
 information, the State Bar deprived him of a valuable property right—his license to practice law—

² The court notes that while plaintiff is proceeding *pro se*, he is also a licensed attorney in the state of Nevada.

1 without a fair and impartial hearing. He asserts that a Fourth Amendment violation has therefore
 2 occurred. The Fourth Amendment does not, however, provide broad protection of any and all
 3 property. These allegations instead form the basis for a due process claim under the Fourteenth
 4 Amendment. They will be therefore be analyzed as such.

5 *B. Due process violations*³

6 Plaintiff's first federal claim for relief alleges that the State Bar and unnamed employees
 7 have "grossly failed to train, supervise, and discipline [its employees] in the fundamental laws of
 8 discipline and how they should act[] on behalf of themselves." (Doc. # 7 at 4). He alleges further
 9 that the actions of the individual defendants that form the brunt of the allegations in his complaint
 10 are the result of *de facto* policies of the State Bar and its employees. (*Id.*) Finally, he claims that
 11 the supervisory and policy-making "investigators" of the State Bar have effectively condoned the
 12 practices and policies by sanctioning the ethical rules with indifference to their violation of due
 process principles. (*Id.* at 4–5).

13 These conclusory allegations are accompanied by few statements of actual fact. The only
 14 factual basis for the supervisory and policy-making theories of liability—or any other theory of
 15 liability—is defendant Machado's disclosure of information related to complaints of attorney
 16 misconduct against Mr. Phillips. In the SAC, plaintiff alleges that that the dissemination of
 17 information about the disciplinary actions against him shows that defendants have failed to follow
 their own rules on conduct, specifically NSCR 121(1), which states that:

18 [a]ll proceedings involving allegations of misconduct by an attorney shall be kept
 19 confidential until the filing of a formal complaint. All participants in a proceeding,
 20 including anyone connected with it, shall conduct themselves so as to maintain the
 confidentiality of the proceeding until a formal complaint is filed.

21 N.S.C.R. 121(1).

22 Defendants argue that NSCR 121(15) qualifies NSCR 121(1) by allowing the State Bar to
 23 disclose certain information upon request by a third party. (*See* doc. # 10 at 4). The court agrees
 24 with defendants. NSCR 121(15) reads: [n]otwithstanding Rule 121(1), the state bar may
 25 disseminate the procedural status and the general nature of a grievance or complaint upon request."

26
 27 ³ Plaintiff's third federal claim for relief is also a due process claim under the Fourteenth
 28 Amendment. The claim consists of conclusory allegations or factual allegations that the court has
 already analyzed with respect to Mr. Phillip's first claim for violation of his due process rights.
 The court's analysis of all plaintiff's claims for violation of his due process rights under the U.S.
 Constitution will therefore be contained in this section.

1 N.S.C.R. 121(15). NSCR 121(15) gives the State Bar explicit discretion to disclose the procedural
 2 status and nature of grievances to third parties upon their request. In light of NSCR 121(15), Mr.
 3 Machado's alleged disclosure of the existence of bar grievances against Mr. Phillips does not
 4 violate the State Bar's own rules on conduct. In fact, the allegations place Mr. Machado's conduct
 5 squarely within the ambit of NSCR 121(15).

6 In his opposition to defendants' motion to dismiss, Mr. Phillips argues for the first time
 7 that regardless of whether the defendants or any other official affiliated with the State Bar violated
 8 their own rules, the rules are contradictory and therefore violate due process. Plaintiff's SAC does
 9 not contain allegations about the contradictory nature of the rules. A motion to dismiss is evaluated
 10 on the face of the complaint, and not on new arguments made by the plaintiff in subsequent
 11 pleadings. *See Iqbal*, 129 S.Ct. at 1949. The court will not consider this argument.

12 Taking plaintiff's sparse remaining factual allegations as true, the court will determine
 13 whether he has alleged a plausible claim for relief under a due process claim based on the State
 14 Bar's disclosure of the existence of attorney misconduct claims against him consistent with NSCR
 15 121(15). Mr. Phillips does not distinguish between procedural and substantive due process, so his
 16 claims regarding Mr. Machado's conduct will be discussed under each theory.

17 *i. Procedural due process*

18 "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by
 19 the Constitution and laws of the United States, and must show that the alleged deprivation was
 20 committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988)
 21 (citation omitted). The Fourteenth Amendment protects individuals against the deprivation of
 22 liberty or property by the government without due process. To prevail on a section 1983 procedural
 23 due process claim, a plaintiff must show: (1) a liberty or property interest protected by the
 24 Constitution; (2) a deprivation of that interest by the government; and (3) a lack of process.
 25 *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). State law is the source for
 26 determining the constitutionally cognizable property interest; the due process clause does not
 27 create substantive rights in property. *See id.*; *see also Brewster v. Bd. of Educ.*, 149 F.3d 971, 982
 28 (9th Cir. 1998). "Notice and a meaningful opportunity to be heard are the hallmarks of procedural
 due process." *Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012) (quotation marks and
 alterations omitted) (quoting *Guenther v. Comm'r*, 889 F.2d 882, 884 (9th Cir. 1989).

1 The allegations in the SAC relate to the dissemination by the State Bar and its employees
 2 of information about grievances pending against the plaintiff. (Doc. # 7). In his opposition to this
 3 motion, Mr. Phillips alleges that the dissemination deprived Mr. Phillips of a fair and impartial
 4 hearing on the grievances. (Doc. # 11 at 3). Beyond these conclusory allegations, Mr. Phillips does
 5 not explain how release of the information impacted the process for resolving the grievances.

6 He correctly argues that his law license is a property interest, but he fails to allege that he
 7 was deprived of that interest. The plaintiff must allege a deprivation of the alleged property interest
 8 to state a claim for procedural due process. *See Portman*, 995 F.2d at 904. Furthermore, plaintiff
 9 fails to allege any connection between disclosure of information about a grievance proceeding and
 10 a lack of process for that proceeding. Importantly, he does not make any factual allegations related
 11 to the sufficiency of notice or denial of a meaningful opportunity to be heard. *See Ludwig* at 1053.
 12 He therefore fails to allege a lack of process, a necessary element of a claim for violation of
 procedural due process under section 1983. *See Portman*, 995 F.2d at 904.

13 Mr. Phillips has failed to make factual allegations sufficient to support a claim for violation
 14 of his procedural due process rights under section 1983.

15 *ii. Substantive due process*

16 The Supreme Court has described the “fundamental” rights protected by substantive due
 17 process as “those personal activities and decisions that this Court has identified as so deeply rooted
 18 in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty,
 19 that they are protected by the Fourteenth Amendment.” *Washington v. Glucksberg*, 521 U.S. 702,
 727 (1997).

20 Substantive due process prevents the government from engaging in conduct that “shocks
 21 the conscience” or interferes with rights implicit in the concept of ordered liberty.” *Rochin v.*
 22 *California*, 342 U.S. 165, 175 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937). Those
 23 rights are few, and include “the right of the individual to contract, to engage in any of the common
 24 occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children,
 25 to worship God according to the dictates of his own conscience, and generally to enjoy those
 26 privileges long recognized at common law as essential to the orderly pursuit of happiness by free
 27 men.” *Washington*, 521 U.S. at 727 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

28 Plaintiff does not and cannot cite to any case law indicating that the right to practice law
 free from a public disciplinary action is a “fundamental right . . . so deeply rooted in our history

1 and traditions, or so fundamental to our concept of constitutionally ordered liberty, that [it is]
 2 protected by the Fourteenth Amendment.” *Washington*, 521 U.S. at 727. Moreover, the alleged
 3 disclosure of general information about a disciplinary proceeding against Mr. Phillips to a reporter
 4 does not “shock the conscience.” *See Rochin*, 342 U.S. at 175.

5 Plaintiff has not stated a cognizable claim for a violation of his substantive due process
 6 rights. As discussed above, he has also failed to state a claim for violation of his procedural due
 7 process rights. His claims for relief for violation of his Fourteenth Amendment due process rights
 8 under section 1983 will therefore be dismissed.

9 C. Equal protection

10 Mr. Phillips next federal claim is for violation of his Fourteenth Amendment equal
 11 protection rights under section 1983. He argues that the defendants violated the Equal Protection
 12 Clause of the Fourteenth Amendment by choosing to disclose information about bar grievances
 13 pending against him to a reporter. Mr. Phillips alleges that the State Bar “has shown its racial bias
 14 by at [sic.] picking on [a]ttorneys of race and color,” and that it “improperly and illegally singled
 15 [Mr. Phillips] out.” (Doc. # 7 at 6).

16 Section 1983 provides a cause of action for the “deprivation of any rights, privileges, or
 17 immunities secured by the Constitution and laws” of the United States. “To state a § 1983 claim
 18 for violation of the Equal Protection Clause, a plaintiff must show that the defendants acted with
 19 an intent or purpose to discriminate against the plaintiff based upon membership in a protected
 20 class.” *Thorton v. City of St. Helens*, 425 F.3d 1158, 1167-68 (9th Cir. 2005) (internal quotations
 21 and citation omitted). “Where the challenged governmental policy is ‘facially neutral,’ proof of its
 22 disproportionate impact on an identifiable group can satisfy the intent requirement only if it tends
 23 to show that some invidious or discriminatory purpose underlies the policy.” *Lee v. City of L.A.*,
 24 250 F.3d 668, 686 (9th Cir. 2001) (citation omitted). “All racial classifications, imposed by
 25 whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under
 26 strict scrutiny.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113,
 27 132 L. Ed. 2d 158 (1995).

28 Reading plaintiff’s complaint in the most favorable light, the court finds that plaintiff fails
 to allege that defendants treated him or any other non-white attorneys—as a protected class—
 differently from other similarly situated attorneys. The SAC contains no allegations about the
 conduct of the State Bar or any of its employees with respect to any attorney other than plaintiff,

1 besides conclusory statements about “picking on attorneys of race and color.” (Doc. # 7 at 6). Mr.
 2 Phillips fails to allege how or why he was “singled out,” or how the decision to comply with a
 3 reporter’s request for information about grievances pending against him was motivated by any
 4 “invidious or discriminatory purpose.” *Lee v. City of L.A.*, 250 F.3d at 686.

5 Similarly, plaintiff’s conclusory allegations that the State Bar failed to properly screen
 6 employees for racial bias lack factual support. Mr. Phillips fails to bolster these conclusions with
 7 any non-conclusory claims, which, if taken as true, establish a policy or custom of hiring
 8 employees with a predisposition to “pick on” attorneys of a certain race or ethnicity. Viewing the
 9 allegations in the light most favorable to him, plaintiff has thus failed to plead a discriminatory
 10 policy that has resulted in a protected class being treated differently from other similarly situated
 11 individuals. Mr. Phillips has therefore failed to state a claim for violation of his Fourteenth
 12 Amendment equal protection rights under section 1983. That claim will be dismissed.

12 *D. State Law Claims*

13 All of plaintiff’s federal law claims will be dismissed based upon the analysis above. After
 14 dismissal of the federal claims, the court will no longer have original jurisdiction over any claim
 15 in the SAC. The court cannot, therefore, exercise supplemental jurisdiction over Mr. Phillip’s state
 16 law claims under 28 U.S.C. § 1367. Plaintiff’s remaining state law claims will be dismissed
 17 without further analysis.

17 *D. Eleventh Amendment and Qualified Immunity*

18 Defendants argue that the Eleventh Amendment protects the State Bar and its employees,
 19 to the extent they acted within their official capacities, from liability for plaintiff’s claims for
 20 monetary damages. (Doc. # 10 at 3–4). They also contend that the individual defendants are
 21 entitled to qualified immunity, providing an additional layer of protection against civil liability for
 22 damages. (*Id.* at 4–6). Because plaintiff fails to state cognizable claims over which this court has
 23 jurisdiction against any defendant in any capacity, the court will not address the immunity issues.

24 **IV. Conclusion**

25 Plaintiff fails to state a claim upon which relief can be granted under federal law. Plaintiff’s
 26 federal claims will be dismissed. After dismissal of the federal claims, the court will have no
 27 jurisdiction over the plaintiff’s state law claims, and the state claims will be dismissed as well.
 28 Plaintiff’s complaint will therefore be dismissed in its entirety.

1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants The State
3 Bar of Nevada (the "State Bar") and Phillip J. Pattee's motion to dismiss the second amended
4 complaint (doc. # 10) be, and the same hereby is, GRANTED.

5 IT IS FURTHER ORDERED that *pro se* plaintiff David Lee Phillip's second amended
6 complaint (doc. # 7) be, and the same hereby is, DISMISSED in its entirety without prejudice.

7 The clerk shall enter judgment accordingly and close the case.

8 DATED March 3, 2016.

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11 UNITED STATES DISTRICT JUDGE
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